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Will the next generation of preferential trade and investment agreements undermine prevention of noncommunicable diseases? A prospective policy analysis of the Trans Pacific Partnership Agreement



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ABSTRACT

The Trans Pacific Partnership Agreement (TPPA) is one of a new generation of 'deep' preferential trade and investment agreements that will extend many of the provisions seen in previous agreements. This paper presents a prospective policy analysis of the likely text of the TPPA, with reference to nutrition policy space. Specifically, we analyse how the TPPA may constrain governments' policy space to implement the 'policy options for promoting a healthy diet' in the World Health Organization's Global Action Plan for Prevention and Control of Noncommunicable Diseases (NCDs) 2013–2020.

This policy analysis suggests that if certain binding commitments are made under the TPPA, they could constrain the ability of governments to protect nutrition policy from the influence of vested interests, reduce the range of interventions available to actively discourage consumption of less healthy food (and to promote healthy food) and limit governments' capacity to implement these interventions, and reduce resources available for nutrition education initiatives. There is scope to protect policy space by including specific exclusions and/or exceptions during negotiation of trade and investment agreements like the TPPA, and by strengthening global health frameworks for nutrition to enable them to be used as reference during disputes in trade fora.

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1. Introduction

Achieving coherence between trade and noncommunicable disease (NCD) prevention policy, such that neither

undermines the other's goals [1], remains challenging. In 2011, Samoa acceded to the World Trade Organization (WTO) on the condition that the nation remove its ban on turkey tail imports [2]. Although the government of Samoa, a nation with one of the highest obesity rates in the world, introduced the ban to improve health by removing a low quality fatty meat from its food supply, the WTO rules limit use of policies that act as barriers to trade [3]. A similar nutrition policy constraint occurred when the Thai

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Food and Drug Administration proposed a law intended to reduce children's consumption of unhealthy snack foods by requiring that the warning message 'Children Should Take Less' be displayed in red text on the packaging of these products, as well as traffic-light coloured symbols for energy, sugar, fat and sodium content. After some WTO members raised concerns over the labelling plan in the committee on Technical Barriers to Trade, one of the WTO's 30 agreements, the regulation was delayed and in 2011 an industry-preferred option – Guideline Daily Amount 'thumbnail' labelling – was mandated instead [4].

These are two examples of how trade agreements can affect the ability of governments to implement effective policies to improve diets and prevent NCDs, and provide an indication of how trade agreements might constrain countries' abilities to implement the recommendations outlined in the World Health Organization's (WHO's) Global Action Plan for the Prevention and Control of NCDs, 2013–2020 (NCD Global Action Plan) [5]. While the WTO has increasingly recognised the importance of health concerns in trade disputes, particularly in relation to tobacco [6], bilateral and regional trade and investment agreements often contain provisions that exceed those of the WTO agreements and have much less transparent dispute settlement mechanisms (which limits the opportunity for precedent) [7].

Trade and investment agreements can play an important role in providing fair treatment and a predictable policy environment for companies, and may also, in some circumstances, provide opportunities for governments to resist domestic lobbying by local industry. But they also constrain the domestic policy space available to national governments (the 'freedom, scope, and mechanisms that governments have to choose, design, and implement public policies to fulfil their aims' [8]), and can thus affect the autonomy of national governments in policy-making across all sectors of government [7,9].

Policy analysis can help to identify possible areas of incoherence between binding trade policies and other legitimate aims of government [11–14]. Indeed, efforts to improve nutrition and prevent NCDs have a recognised potential for conflict with trade policies. During the past 30 years there has been significant growth in global trade and investment in highly processed foods (often high in salt, saturated fat and sugar, and associated with diet-related NCDs) [15,16], as well as cross-border investment in food retail, advertising and promotion [17,18]. This trade and investment has contributed to increased availability, accessibility and affordability of less-healthy foods relative to healthy foods, and has been associated with shifts to poorer nutritional quality diets [19–22]. The 'policy options for promoting a healthy diet' recommended in the NCD Global Action Plan will apply to the products of trade and investment, which are also governed by international trade agreements. With binding international agreements to liberalise food-related trade and investment on one hand, and non-binding international commitments to NCD prevention on the other, there is potential for trade and investment agreements to trump health policy and

Box 1 Definition of trade terms

Foreign direct investment: An investment in a country other than that of the investor, involving a long-term relationship and substantial, but not necessarily majority, interest in an enterprise by the investor. Foreign direct investment can take place through direct entry or investment in existing firms. International Investment Agreements are designed to facilitate foreign direct investment (e.g. Bilateral Investment Treaties).

Non-discrimination: The practice of not making a distinction in favour of or against certain trading partners, or between imported and domestically produced goods, once goods have entered the market. Foreign goods or committed services covered by a trade agreement must be treated the same as the identical or 'like' domestic good or service.

Sanitary and phytosanitary (SPS) measures: Technical barriers designed for the protection of human health or the control of animal and plant pests and diseases.

Subsidy: A direct or indirect benefit/incentive granted by a government for the production or distribution (including export) of a good.

Technical Barriers to Trade (TBT): Regulations, standards, testing and certification procedures, which can create obstacles to trade.

Trade agreement: A negotiated agreement between two or more countries to limit or alter their policies with respect to trade. Trade agreements can be bilateral, regional or multilateral. The use of the prefix 'preferential' highlights that such agreements favour member parties over non-members by extending tariff and other non-tariff preferences. The term 'trade and investment agreement' can also be used to differentiate trade agreements that include an investment chapter with similar text to international investment agreements.

Source: Adapted from Thow [10]

constrain or limit national efforts to improve diets and prevent disease. This effect has been documented in other areas of public health such as tobacco control and access to medicines [8,23–27], but to date there has been no systematic analysis of the effects of new preferential trade and investment agreements on policy space for promoting healthy diets [28].

This paper aims to help address that evidence gap. Our policy analysis considers (1) how the Trans-Pacific Partnership Agreement (TPPA) and other preferential trade and investment agreements may constrain governments' policy space to operationalise the NCD Global Action Plan 'policy options for promoting a healthy diet', and (2) opportunities to improve policy coherence between trade and public health in this context.

Countries currently involved in the TPPA negotiations, which are reportedly due to conclude in 2014, include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America (USA) and Vietnam. The TPPA is seen by countries involved as the model for '21st century trade agreements' and will likely set a precedent for further expansion of trade and investment provisions into national policy space [29]. To some extent, the TPPA also represents

Table 1

Analytical framework and overview of findings: Trade and investment agreement inclusions with potential implications for nutrition policy space, based on the policy options in the WHO NCD Global Action Plan.

Preferential trade and investment agreement inclusions	WHO NCD Global Action Plan			
	Protecting policy making from vested interests	Specific policy options to improve healthfulness of food supply (reduce less healthy food options)	Specific policy options to improve healthfulness of food supply (increase healthy food options)	Policies to support institutional action and consumer education
Chapters in KORUS				
1. Initial Provisions and Definitions				
2. National Treatment and Market Access for Goods	*	*		
3. Agriculture			*	
4. Textiles and Apparel				
5. Pharmaceuticals and Medical Devices				
6. Rules of Origin and Origin Procedures				
7. Customs Administration and Trade Facilitation				*
8. Sanitary and Phytosanitary Measures		*		
9. Technical Barriers to Trade	*			*
10. Trade Remedies				*
11. Investment		*		
12. Cross-Border Trade in Services				*
13. Financial Services				*
14. Telecommunications				*
15. Electronic Commerce				*
16. Competition-Related Matters			*	
17. Government Procurement				
18. Intellectual Property Rights				
19. Labor				
20. Environment				
21. Transparency	*			
22. Institutional Provisions and Dispute Settlement				
23. Exceptions				
New additions proposed for TPPA				
Regulatory Coherence	*			
State-Owned Enterprises		*		
E-Commerce			*	
Competitiveness and Supply Chains (includes harmonisation)				*
Small- and Medium-Sized Enterprises				

the trend towards 'economic integration' agreements, with significant efforts to harmonise 'behind the border' regulation [30].

Publicly available information on the TPPA negotiations is limited by the secrecy of the negotiations, although the USA reports that the draft negotiating text draws heavily on the bilateral agreement between the USA and the Republic of South Korea ('KORUS') which entered into force in 2012 [29]. Therefore, we have used the final text of KORUS [31] as the basis for the policy analysis framework, supplemented by leaked draft text of the TPPA, commentary and analysis of this leaked text by academics and non-government organisations, and other publicly available information on the TPPA negotiations, for example, from the USA Congressional Research Service, which publishes regular updates (e.g. [29]). Preferential trade agreements involving the USA tend to use a template approach, building on each successive agreement to continually extend the provisions contained in the agreements of the WTO. Basing our analysis on the most recent preferential trade treaty (KORUS)

provides a reasonable indication of the likely inclusions in the TPPA.

We approached this research from a prospective policy analysis perspective [32], and have drawn on *ex-ante* policy appraisal techniques [33,34] to analyse the trade and investment provisions as they apply to public health nutrition policy space. The WHO Global Action Plan for the Prevention and Control of NCDs 2013–2020 has been subject to extensive international review and was approved at the 2013 World Health Assembly [5]. It contains current best-practice policy options for 'promoting a healthy diet' for the prevention of NCDs. Our analysis was also informed by literature regarding implications of trade and investment agreements for policy space in public health more broadly [8,23–28].

Table 1 presents a summary of the analytic framework and key findings. For the purpose of analysis (and to reduce repetition in the Findings section) we grouped the policy options outlined in the Global Action Plan according to their focus (see subheadings in **Box 1**).

Box 2: Global Action Plan for the Prevention and Control of NCDs 2013–2020: policy options for member states to promote healthy diets

Broad recommendation for nutrition policy, including protection from vested interests:

38. Member States should consider developing or strengthening national food and nutrition policies ...while protecting dietary guidance and food policy from undue influence of commercial and other vested interests

Policy options to improve healthfulness of food supply:

39.(c) Develop guidelines, recommendations or policy measures that engage different relevant sectors, such as food producers and processors, and other relevant commercial operators, as well as consumers, to: Reduce the level of salt/sodium added to food (prepared or processed); Increase availability, affordability and consumption of fruit and vegetables; Reduce saturated fatty acids in food and replace them with unsaturated fatty acids; Replace trans-fats with unsaturated fats; Reduce the content of free and added sugars in food and non-alcoholic beverages; Limit excess calorie intake, reduce portion size and energy density of foods

39.(d) Develop policy measures that engage food retailers and caterers to improve the availability, affordability and acceptability of healthier food products (plant foods, including fruit and vegetables, and products with reduced content of salt/sodium, saturated fatty acids, trans-fatty acids and free sugars).

39.(e) Promote the provision and availability of healthy food in all public institutions including schools, other educational institutions and the workplace.

39.(f) As appropriate to national context, consider economic tools that are justified by evidence and may include taxes and subsidies, that create incentives for behaviours associated with improved health outcomes, improve the affordability and encourage consumption of healthier food products and discourage the consumption of less healthy options.

39.(g) Develop policy measures in cooperation with the agricultural sector to reinforce the measures directed at food processors, retailers, caterers and public institutions, and provide greater opportunities for utilization of healthy agricultural products and foods.

Policy options to support consumer education and institutional action:

39.(b) Implement WHO's set of recommendations on the marketing of foods and non-alcoholic beverages to children, including mechanisms for monitoring.

39.(h) Conduct evidence-informed public health campaigns and social marketing initiatives to inform and encourage consumers about healthy dietary practices. Campaigns should be linked to supporting actions across the community and within specific settings for maximum benefit and impact.

39.(i) Create health- and nutrition-promoting environments, including through nutrition education, in schools, child care centres and other educational institutions, workplaces, clinics and hospitals, and other public and private institutions.

39.(j) Promote nutrition labelling, according but not limited to, international standards, in particular the Codex Alimentarius, for all pre-packaged foods including those for which nutrition or health claims are made.

Source: World Health Organization [5] Note: Subheadings are authors' own.

2. Implications for protecting public health nutrition policy from influence of vested interests

The Director General of the WHO stated at the 8th Global Conference on Health Promotion in June 2013: 'Efforts to prevent noncommunicable diseases go against the business interests of powerful economic operators' [35]. In the context of this analysis, the food industry represents a vested interest [36–38]. The protection of national nutrition policy-making from vested interests is likely to become more difficult under trade and investment agreements like the TPPA, because rules about transparency and requirements for regulatory coherence and 'good regulatory practice' enshrine the right of, and provide new avenues for, the food industry to provide input into policy development. For example, Article 9.6 in KORUS (on transparency regarding Technical Barriers to Trade) states that 'Each Party shall allow persons [a national or an enterprise] of the other Party to participate in the development of standards, technical regulations, and conformity assessment procedures' (also see Article X.3.7 in the leaked draft proposal for the regulatory coherence chapter of the TPPA [39]). These provisions mean that food industry representatives from other countries (in addition to the home country) would have the opportunity to participate in policy development, and that the scope to limit their input into policy-making would be restricted. There may also be benefits to public health nutrition policy from increased transparency and consultation on policy change, since this can present an opportunity for public health input. However, it should be noted that the lack of transparency of the TPPA negotiations mean that there is limited capacity for public health nutrition input during the negotiation processes.

The proposed rules on Regulatory Coherence in the TPPA may also influence national nutrition policy-making. These would require the establishment of a central body, similar to the US Office of Information and Regulatory Affairs, to vet proposed regulation and its compliance with trade agreements [29,40,41]. Since public health nutrition policy applies to the products of international trade and investment (outlined below), which are covered by binding trade and investment agreements, this move to 'coherence' may result in government reluctance to implement strong national nutrition policies that might be perceived as barriers to trade and/or investment, creating what is known as "policy or regulatory chill" [42].

3. Implications for policy options to improve healthfulness of food supply by reducing the availability of less healthy food options

The policies identified in the NCD Global Action Plan to improve the healthfulness of the food supply by reducing availability of less healthy food focus on food producers and processors, food retailers and caterers, as well as including broader measures such as fiscal policy. As these policies will apply to the products of investment, commitments made in trade and investment agreements regarding investor protection may constrain policy space for implementing these options. Under many bilateral and preferential agreements, investors are protected from expropriation of their investment (government action that reduces the value of their investment) and unfair treatment. In most recent agreements, investors have the option to recourse for expropriation and unfair treatment under Investor State Dispute Settlement (ISDS) mechanisms, which the TPPA is likely to include [43]. These mechanisms allow corporations (investors) to directly sue governments for compensation—in contrast to the dispute settlement mechanisms in the agreements of the WTO, that allow only other governments to contest government policies. The investor-state arbitration process has been criticized for being non-transparent (in contrast to the WTO, where arbitration processes and outcomes are made public), for lacking many of the safeguards of domestic legal processes, and for failing to consider broader issues related to public policy [23]. Civil society has also raised significant concerns that the composition of dispute settlement tribunals (three private sector lawyers) is biased towards the interests of industry and does not support good judicial practice [44].

Policy interventions which successfully discourage consumption of less healthy food options could be contested as a form of expropriation by transnational companies who make these products who do not adapt or offer healthier products. For example, a transnational manufacturer of unhealthy products who had established a factory through direct investment – and whose sales decreased as the result of government intervention for nutrition purposes – might consider that they have a case to contest the regulation under an ISDS mechanism [45]. This would be the case even when the policies are non-discriminatory (in that they would apply equally to domestic and foreign-owned aspects of the food supply). A recent relevant public health example is Phillip Morris Asia's use of the ISDS mechanism in a Bilateral Investment Treaty to seek compensation for the Australian Government's plain packaging of tobacco laws [46]. Even if unsuccessful, such action can result in 'regulatory chill', in which other governments are unwilling or unable to risk expensive litigation regarding their policy decisions [26,47,48]. This can effectively delay action by other governments and has the potential to stifle innovation in public health policy-making.

In KORUS, expropriation of a covered investment is permitted 'for a public purpose' including 'measures to protect health', and this Agreement also has exceptions for existing 'non-conforming measures' (i.e. policy measures that do not comply with the agreement) [31]. Exceptions like these may be important in preserving public health

nutrition policy space and public health policy makers need to be aware of them. Experience with exceptions in the WTO agreements indicates that it is possible to use them to protect public health [25], although policy space may still be constrained by requirements that measures be the 'least trade-restrictive' that are technically and economically feasible. However, whether the KORUS safeguards are sufficiently protective has not been tested yet, and South Korea is reportedly seeking the renegotiation of the ISDS clause in KORUS [49]. Evidence from previous agreements with similar exceptions have not prevented claims over environmental pollution [50]. A critical concern regarding the TPPA is that leaked draft text of the rules on investment suggest it is unlikely to allow any general exceptions to safeguard health and consumer protection policies [43,51].

In addition, where fiscal policies such as taxes on less healthy foods or beverages to promote a healthy diet [5] are applied to certain imported foods or beverages deemed to be 'less healthy', they may be open to contest under agreements like the TPPA. Trade agreement rules on national treatment are intended to eliminate discrimination between 'like' products, and definitions of 'healthy' and 'less healthy' foods made on the basis of public health nutrition criteria may be contestable, in a large part due to the cultural and geographical diversity of food consumption behaviours [6]. Previous experience in the WTO indicates that the definition of 'like' products can prove contentious. For example, a WTO dispute settlement panel deemed asbestos insulation 'like' the less health-damaging local glass-fibre insulation [52,53]. However, this ruling was overturned by the WTO Appellate Body, which has the mandate to review dispute panel decisions.

Trade and investment agreements are becoming increasingly legalistic in their dispute resolution processes, with fewer political oversights that allow for national policy space [54]. While trade rules in these agreements place the 'burden of proof' on complainants, in terms of demonstrating their compliance with principles supporting evidence-based and 'least trade-restricting' public policy measures, the respondents bear the 'burden of presenting evidence', in terms of demonstrating both the need for intervention, the evidence for effectiveness and that the intervention is the least trade restricting/distorting (in particular, rules relating to Sanitary and Phytosanitary measures) [6]. This might reduce the scope for governments to implement innovative measures that have only indicative evidence for their effectiveness, due to the regulatory chill effect of the cost of both evidence gathering and defending contested policy.

4. Implications for policy options to improve healthfulness of food supply by increasing the availability of healthy food options

Policies to improve the healthfulness of the food supply by increasing healthy food options interface with trade and investment agreements where they apply to government procurement and agriculture, which are covered by trade and investment rules on non-discrimination in market access. There has been growing interest in providing healthy food in public institutions through government

procurement systems [55,56]. These measures sometimes also advocate sourcing foods locally, in an effort to achieve environmental, health, social, and development policy goals [57]. This is at least partly due to the fact that fresh produce can suffer nutritional degradation during storage [58] and transportation [59], both of which are likely to increase for imported foods.

However, promoting the provision and availability of healthy food in public institutions may be interpreted as a discriminatory measure: (1) against unhealthy food products (in particular, imports and the products of investment) because they are 'like' the healthy ones; and (2) between service providers on the basis of location (for example, sourcing fresh produce from local farms as opposed to imported produce). Two exceptions in KORUS provide examples of how public health nutrition policy space could be specifically protected in relation to government procurement. Exemptions are provided for government procurement specifically regarding domestic content requirements (so, government procurement can preferentially use domestic produce) and also for 'human feeding programs', which may include school food programs. Government procurement is also specifically excluded from rules regarding competition and investment. Another possible protection is that rules for government procurement often apply only to large-scale contracts (i.e., primarily oriented to major capital projects) and generally exclude contracts related to recurrent expenditures or less costly programs. This could reduce their likelihood of being used to challenge healthy food programs funded by governments. However, it is likely that the TPPA negotiators will seek further liberalization regarding procurement [29].

Policy options that provide subsidies to the agricultural sector to increase production and availability of healthier foods are also potentially discriminatory because of their selective application, which gives specific crops a production advantage. At this point, however, agricultural subsidies are largely permissible under trade and investment agreements because agricultural subsidy reduction is addressed only at the multilateral level (WTO) [29]. In addition, the recent WTO decision on food security at the Bali Ministerial Meeting has clearly protected space to support agricultural investment in traditional staple foods [60], and may serve to raise awareness of the legitimacy of using subsidies to increase availability of healthy traditional staples. For example, root crops, millets, and sorghum are all traditional staple crops that are relatively high in nutrients and fibre.

5. Implications for policy options to support consumer education and institutional action

Governments seeking to introduce restrictions on marketing of foods and beverages for health purposes may face constrained policy space under preferential trade and investment agreements because such restrictions can be seen to represent barriers to cross-border advertising (a form of trade in services), which is particularly an issue concerning marketing of foods to children [61]. While KORUS recognises the right of countries to regulate and introduce new regulations on supply of services, it also requires

stringent criteria and evidence for any measure that might restrict trade in services. The associated cost and potential for challenge is likely to make it more difficult for governments to implement innovative measures in this area.

Similarly, health policies to improve nutrition labelling may constitute barriers to trade under rules regarding TBT. A priority of TBT rules is that measures should be evidence based and 'not more trade-restrictive than necessary to fulfil a legitimate objective' [62]. Without a clear international standard or reference, the concept of 'least trade restricting' is open to interpretation, as illustrated by Thailand's attempt to introduce a traffic light nutrition labelling system on unhealthy snack foods (described earlier). The TBT rules being negotiated in the TPPA may require that 'domestic technical regulations of trading partners are recognized as equivalent to domestic regulations when possible', as part of facilitating trade [29]. This could mean that foods produced in a country with no requirement for nutrition-related labelling might not be required to meet the nutrition labelling requirements of an importing country (if the importing country had agreed to recognise the exporting country's labelling regulation as sufficient). Harmonisation of technical standards under the TPPA may also reduce countries' options in developing new standards for labelling requirements that exceed the agreed standard.

Trade and investment agreements are unlikely to have direct effects on campaigns (e.g. in the mass media) to encourage consumers to choose healthy food options and support institutions to make them available. However, these agreements may reduce the resources available to governments to develop and implement such campaigns, as the result of reduced tariff revenue and binding commitments to new trade infrastructure such as fora for policy coherence and trade facilitation. Tariffs are an important source of revenue in most low and middle income countries (LMICs), and liberalization commitments before alternative taxation mechanisms have been adequately developed have been found to reduce public revenue in many of these countries [63,64]. NGOs have raised parallel concerns that increased public expenditure on trade facilitation (i.e. ensuring laws, regulations and other public and private infrastructures are compliant with new trade and investment rules) poses a considerable financial burden on LMICs under binding trade agreements [65].

6. Discussion of policy analysis

This analysis suggests that while there is space for public health nutrition policy intervention, there are five main avenues through which new preferential trade and investment agreements might constrain public health nutrition policy space and affect countries abilities to implement the WHO Global Action Plan for NCDs. First, binding commitments to transparency and coherence in regulatory processes mean ensuring input into policy making by any and all interested stakeholders. This may constrain the ability of governments to protect public health nutrition policy from the influence of vested interests. Second, investor protection provisions may reduce either the range of interventions available to governments to discourage actively consumption of less healthy food options, or their ability

to implement them. Third, trade rules regarding non-discrimination may reduce government policy space to implement policies that differentiate between 'like' products, such as fiscal policies to reduce the affordability of less healthy food options or government procurement policies that preference healthy food options. Fourth, rules to reduce technical barriers to trade may restrict the ability of governments to use technical standards (such as labelling requirements) that can act as barriers to trade. Fifth, resources available for initiatives to educate consumers in LMICs may suffer due to decreased tariff revenue and increased public expenditure resulting from binding commitments to trade facilitation and harmonisation.

However, it is important to note that the potential constriction of policy space we describe is not inevitable. Contextual factors play a significant role in determining countries' capacity to exert policy autonomy in relation to public health nutrition [66,67]. For example, the types of food industry present in the country and their contribution to Gross Domestic Product often determines the strength of their voice in decision-making and their capacity to contest policy decisions. Similarly, the type of government and their ideological leaning, as well as the existing capacity of industry to engage in political processes, will affect the extent to which opportunities to speak into decision making fora translates into influence or effect. Civil society organisations also play an essential role in identifying commercial and geopolitical power plays, and the influence of vested interests. This is a critical factor in supporting strong NCD prevention policies and enabling governments to resist political pressure from industry and trading partners.

Nevertheless, regulatory chill and financial capacity are very real concerns when it comes to governments acting innovatively to implement the policy options for promoting a healthy diet that are identified in the WHO Global Action Plan. Arbitration costs associated with ISDS can amount to millions of dollars and the awards are often in the hundreds of millions [68]. These concerns regarding regulatory chill are likely to be more pronounced for LMICs, which may be more dependent on investment for continued economic growth and may lack resources to counter actual or threatened contest of policy intervention.

The constraints to policy space that we have described are also likely to reduce innovation in policy interventions to improve diets, with binding commitments in trade and investment agreements restricting the available options for trade, fiscal and agricultural policy intervention for NCD prevention. While the list of policy options provided in the NCD Global Action Plan provides a clear framework for action, there is a spectrum of 'hard' to 'soft' options available for many of the Action Plan goals. For example, the goal of reducing salt in processed foods can theoretically be achieved through legislation, collaborative partnerships between government and industry, or education directed at food processors. Although legislative approaches are increasingly seen as the most effective option [69], the 'least trade-restrictive' requirement under TBT and SPS agreements could incentivize non-legislative measures.

This problem is compounded by the lack of relevant international standards to support policy innovation in

food-related NCD prevention. This is in contrast with tobacco control, for example, where novel measures such as plain packaging are recommended in the Framework Convention on Tobacco Control. The push for trade-related policies at the national level to align with international standards (e.g. [70]) has the potential to reduce policy innovation in NCD prevention, creating challenges in the implementation of the NCD Global Action Plan.

7. What could protect policy space for the prevention of diet-related NCDs?

7.1. International standards

As noted in our analysis, the lack of international standards and frameworks for public health nutrition that could be used as reference in arbitration reduces the likelihood that nutrition will be considered in disputes arising from trade and investment agreements. A key existing standard for nutrition is the Codex Alimentarius, which is used as a reference in trade fora, traditionally mainly in relation to food safety. There has been encouraging progress in addressing NCDs in Codex, such as the inclusion of Nutrient Reference Values for salt and saturated fat [71]. However, these reference values are narrowly focussed on labelling for health purposes (in relation to only salt and fat) and Codex has limited scope to address broader interventions to improve the food supply because of the nature of its remit on labelling and food content [72].

The WHO also has regulatory and treaty-making powers, enabling it to develop legally binding global conventions, in addition to more common, non-binding World Health Assembly (WHA) resolutions (such as endorsement of the NCD Global Action Plan). There is potential to draw on strengths of the Framework Convention on Tobacco Control, a legally binding instrument, to enhance and expand international nutrition-related standards [73]. The WHO's set of recommendations on the marketing of foods and non-alcoholic beverages to children might be one area where a new (stronger) measure could be implemented at the international level, with a view to developing further binding agreements to support the NCD Global Action Plan and increasing policy space for public health nutrition.

Another useful policy direction would be a WHA resolution specifically stating that the NCD Global Action Plan and its recommendations be given due consideration in all trade or investment treaty disputes that may relate to the components of the NCD Global Action Plan. Increased specificity in global nutrition-related plans regarding policy options would also strengthen their capacity to be referenced in global trade fora, as specificity is important for global instruments to be considered as a 'standard' [6]. Similarly, new trade and investment treaties, such as the TPPA, could contain specific language requiring consideration of all WHA approved action plans or recommended public health measures in any dispute with public health implications. Countries could also use the NCD Global Action Plan to support preferential inclusion of non-industry persons, such as public health nutritionists, in decision-making regarding regulatory coherence.

7.2. Exclusions and exceptions

Public health nutrition policy would also be strengthened with a clearer definition of health exceptions in trade and investment agreements, such that they are easier to use. Clarification in the NCD Global Action Plan of the proportionality and appropriateness of the measures that are recommended could increase policy space for NCD prevention by making these policy options clearer candidates for this exception. The exclusion of an ISDS mechanism from the TPPA would be a positive option, given the uncertainties associated with exceptions and the chilling effect.

Given the changing nature of both trade and health policy space, increasing flexibility through a general exceptions clause with a much stronger public health exception than Article 20 of the GATT, as well as more exceptions/exclusions built into the chapters highlighted in this analysis, would also increase policy space for public health nutrition. It might also be possible to retain specific exclusions, as seen in KORUS for government procurement with respect to 'human feeding programs'.

Investment in building the evidence base for specific public health nutrition interventions will also increase the capacity of public health policy makers to defend public health nutrition policy interventions against disputes in trade-related fora.

8. Conclusion

This analysis indicates that the TPPA could reduce policy space to implement the WHO NCD Global Action Plan policy options for promoting a healthy diet. In effect, we see new preferential trade and investment agreements and NCD prevention occupying the same policy 'space'-increasingly one in which binding commitments made in international agreements regarding domestic policy have the potential to constrain policy intervention to improve diets and prevent disease. Further research is also needed to assess implications for food security.

There is scope to retain policy space for nutrition and health by including specific exclusions and/or exceptions during negotiation, and by strengthening the wording and status of the NCD Global Action Plan and other global health frameworks to enable them to be used as references during trade disputes. Ongoing research is needed to fully examine all of the chapters of the TPPA and other trade and investment agreements during the negotiation stage for their possible effects on nutrition and other dimensions of public health, and to evaluate the outcomes of such agreements for nutrition. The extent to which this is possible depends on the level of engagement, consultation, and transparency permitted during negotiation. It also depends on public health researchers and policy makers engaging with the specific policies, as well as the commercial and geopolitical power structures, involved in global trade liberalisation in order to work towards improved policy coherence.

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